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Nos. 84-871, 84-889, 84-1054, and 84-1069

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LOUISIANA PUBLIC SERVICE COMMISSION,
Appellant

vs.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA

CALIFORNIA AND PUBLIC UTILITIES COMMISSION OF CALIFORNIA, *et al.*,
Petitioners

vs.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA

PUBLIC UTILITIES COMMISSION OF OHIO, *et al.*,
Petitioners

vs.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA

FLORIDA PUBLIC SERVICE COMMISSION,
Petitioner

vs.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA

On Appeal and On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF OF PETITIONER, FLORIDA PUBLIC SERVICE COMMISSION

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STATEMENT OF SUPPORT

Due to the press of time and the logistics of preparing a joint brief, the Florida Public Service Commission was unable to file a joint Reply Brief with the Louisiana Public Service Commission, the Public Utilities Commission of Ohio and the Ohio Office of Consumers' Counsel. The Florida Public Service Commission supports the positions advanced by those parties.

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REPLY BRIEF OF PETITIONER, FLORIDA PUBLIC SERVICE COMMISSION

SUMMARY OF ARGUMENT

POINT I

47 U.S.C. §220 does not preempt State depreciation rates for intrastate ratemaking purposes. State law is not preempted by Federal Statute unless the subject matter does not permit State

regulation or the intent of Congress to preempt is unmistakable. Independent State regulation of depreciation for intrastate purposes is clearly feasible. Further, there is no evidence, unmistakable or otherwise, that Congress intended to preempt. Instead, Congress intended that the States have autonomy in determining all elements of intrastate ratemaking policy, including depreciation.

Section 220(b) does not show an intent to bind the States for intrastate ratemaking purposes. The purpose of Section 220 is to reflect the financial condition of carriers so that the FCC may prescribe just and reasonable interstate rates and charges under 47 U.S.C. §§201-205. The FCC's interpretation of Sections 220(b) and 220(h) is incorrect, for it nullifies Section 220(j).

In enacting Section 220, Congress rejected a version of Section 220(j) that would have expressly preempted State depreciation for intrastate ratemaking purposes. It is not necessary for Section 220 to expressly preserve State depreciation authority for ratemaking purposes. That is accomplished elsewhere in the Act. Read as a whole, the Communications Act shows a Congressional intent to preserve in the States all authority over intrastate ratemaking, including the various elements used to establish rates and charges. The relationship between State and Federal ratemaking authority under the Communications Act is radically different from that under the Interstate Commerce Act. The effect of Federal accounting and depreciation authority on State ratemaking authority was changed when ICC accounting and depreciation authority was transferred to the FCC.

The FCC's implementation of Section 220 disproves Congressional intent to preempt. Its long failure to indicate that its depreciation prescriptions might be preemptive and its silence in the face of past State deviations show that it did not believe Section 220 to preempt as a matter of law. The FCC has no authority to change its interpretation of Section 220 at this late date.

POINT II

The FCC lacks authority to preempt State telephone depreciation policy for intrastate ratemaking purposes. The FCC's theory of preemptive authority is consistent with Title III of the Act, which provides for unified FCC regulation of broadcasting; however, it is inconsistent with the Congressional scheme of telephone regulation under Title II of the Act. The Communications Act demonstrates a clear intent that telephone communication be subject to dual regulation. Congress intended that State regulation of intrastate telephone communication be complete and that it be unhindered by possible FCC intervention. The Act does not permit FCC preemption of intrastate telephone regulation simply to advance Federal policy. The FCC may preempt only when State regulation encroaches on FCC authority, such as when a particular subject will not permit dual regulation. The FCC's claim of authority to preempt to avoid frustration of its policies defies the intent of Congress to define the relationship of Federal and State authority over telephone communication within the Act. The FCC's theory allows it to supersede all important State policies governing intrastate communication.

ARGUMENT

I. Section 220 does not preempt State authority over depreciation for ratemaking purposes.

Summary

Contrary to the Respondents' assertion, Section 220 does not preempt as a matter of law.[1] This Court has declared that preemption of State law by Federal statute is not favored absent persuasive reasons — either that the subject matter permits no other conclusion or that Congress has unmistakably so ordained. *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 522

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[1]47 U.S.C. §220.

(1981). Independent State authority over depreciation for intrastate purpose is clearly feasible. Further, there is no evidence, unmistakable or otherwise, that Congress intended to preempt depreciation for purposes of State ratemaking. Instead, the scheme of the Communications Act is clear: Congress intended State autonomy in all elements of intrastate ratemaking.

A. Dual regulation of depreciation for ratemaking and accounting purposes is clearly feasible.

There is no question that dual regulation of depreciation, both for accounting and ratemaking purposes, is clearly feasible. The States have independently set depreciation rates for intrastate ratemaking purposes for well over 50 years. The FCC didn't actively prescribe depreciation rates until the 1940's. After the FCC began to prescribe depreciation rates, the States continued their prior practices. Though State and FCC depreciation rates were quite often the same, they have differed over the years. Even the lower court acknowledged that carriers could record different depreciation rates. None of the Respondents have demonstrated the practical impossibility of dual regulation of depreciation.[2]

B. Section 220, on its face, reflects no intent to preempt the States.

The Respondents' interpretation of Section 220(b) is not supported by its terms. Nothing in Section 220 purports to effect State authority in any manner and Section 220(b) certainly makes no mention of intrastate ratemaking. The purpose of Section 220(b), like that of Section 20(5) of the Interstate Commerce Act, is simply to require carriers to keep their records in a

[2]Carriers are currently applying dual depreciation rates. For instance, in Florida, General Telephone Company of Florida and Southern Bell Telegraph and Telephone Company apply FCC prescribed depreciation rates for interstate purposes and apply State prescribed depreciation rates for intrastate purposes.

manner that accurately reflects their financial condition so that the FCC may prescribe just and reasonable interstate rates pursuant to Sections 201-205 of the Communications Act.[3]

The Respondents' reading of Section 220 creates discord within the provisions of Section 220. The Respondents' interpretation of subsections (b) and (h) of Section 220 renders subsection (j) a nullity. Under the Respondents' theory, subsection (h) would grant the FCC authority to permit State regulation of intrastate depreciation otherwise precluded by subsection (b). This interpretation of Section 220 would reserve to the FCC the discretion to retain all accounting and depreciation authority to itself or delegate intrastate authority to the States. Thus, under the Respondents' theory, State and Federal authority may be defined and harmonized by administrative action. However, in adopting subsection (j), Congress clearly contemplated that legislation would be necessary for that task. Had Congress intended the scheme proposed by the Respondents, legislation would have clearly been unnecessary and it would not have adopted subsection (j).

C. The legislative history of Section 220 shows that Congress rejected an amendment to Section 220 that would have preempted the States for ratemaking purposes.

Congress considered two versions of Section 220(j). The first was proposed by NARUC and accepted by the House. It provided for independent State authority over accounting in general and over depreciation in particular. The second version was proposed by the Senate. The Senate version clearly prevented the States from prescribing systems of accounts or prescribing depreciation rates for *any* purpose. Congress eventually rejected *both* the House and the Senate versions, opting for uniform accounting without preempting State ratemaking authority.

[3]*See Kansas City So. Ry. v. United States*, 231 U.S. 423, 440 (1913); *Interstate Commerce Commission v. Goodrich Transit Company*, 224 U.S. 194, 211 (1912).

NARUC proposed subsection (j) to ensure that Section 220 could not be interpreted by a court to preclude State commissions from reviewing depreciation rates in rate cases.[4] It was one of many provisions proposed by NARUC to protect State autonomy over intrastate communications. Though a court had yet to rule that ICC depreciation prescriptions under Section 20(5) of the Interstate Commerce Act would preempt the States for intrastate ratemaking, the States sought assurances that Section 220 could not be read to preempt the States.

The States' concern over the interpretation of ICC depreciation authority had existed for years and arose out of a history of Federal domination of intrastate ratemaking under the Interstate Commerce Act. ICC authority to prescribe depreciation rates for accounting purposes, adopted in 1920, became a part of an apparent scheme of Federal domination. When Congress proposed to transfer the ICC's powers to the FCC, the States sought multiple assurances to foreclose even the possibility that the concept of Federal domination could be read into any portion of the Act.

In Section 220, NARUC proposed to establish parallel State authority over depreciation accounting to preclude an interpretation of that Section as preempting State authority over depreciation for ratemaking purposes.[5] AT&T attacked NARUC's

[4]See Hearings on H.R. 8301 before House Committee on Interstate and Foreign Commerce, 73d Cong., 2d Sess. 137, 138 (1934) (House Hearings), statement of John E. Benton.

Subsection (j) was one of three new provisions proposed by NARUC. Subsection (h) was proposed to permit the FCC to exempt small carriers from all Federal reporting, leaving such regulation entirely to the States (See House Hearings at 144; Hearings on S. 2910 before Senate Committee on Interstate Commerce, 73d Cong., 2d Sess. 184 (1934) (Senate Hearings), statement of John E. Benton. Subsection (i) was proposed so that the States could ensure that the FCC's system of accounts served both Federal and State purposes. See House Hearings at 143-144.

[5]NARUC's version of subsection (j), in part, preserved State autonomy to prescribe depreciation rates "for purposes of determining *charges, accounts, records or practices.*"

version of subsections (h) and (j) as destroying the uniformity of systems of accounting.[6] AT&T never asserted that the States should be bound to FCC prescribed depreciation rates for intrastate *ratemaking* purposes. In response to AT&T criticism, the Senate deleted the exemption language from Section 220(h) and proposed an entirely different version of subsection (j) that would have clearly preempted State regulation of depreciation for accounting *and* ratemaking purposes.[7]

When the Senate Bill reached the House, NARUC opposed the Senate's version of subsection (j) because it would have destroyed any State authority over depreciation for ratemaking purposes. In the House Hearings, the Senate's version was described by NARUC as "changed in such a manner as to Shreveport us out of the telephone regulatory field."[8] NARUC emphasized that it did not intend to affect FCC accounting authority.[9]

The House Committee, and the House itself, proposed subsections (h) and (j) in their original form. The Conference Committee, and Congress, adopted the House's version of sub-

[6]See Senate Hearings at 94-97; House Hearings at 189-192.

[7]The Senate's version of subsection (j) required the FCC to report if legislation was desirable to *permit* the States to "prescribe their own percentage rates of depreciation. . . ."

[8]In response to a question as to whether NARUC was more afraid of the House Bill than in favor of it, one of NARUC's representatives stated:

> I would not say that, either. I would be afraid of it, should it be changed in such a manner as to Shreveport us out of telephone regulatory field. In other words, if it substantially ousts us from our jurisdiction; but *we do not apprehend that you are going to change it as the redrafted Dill bill has been changed.* House Hearings at 73.

The only significant difference between the "Dill Bill" (S. 3285) and H.R. 8301 were the provisions of Section 214 and sections 220(h) and (j).

[9]See House Hearings at 138.

section (h) and a totally different version of subsection (j). The final version of subsection (j) did not include language preserving State autonomy over accounting, as provided in the House version. Likewise, it did not include language expressly preempting State depreciation authority for ratemaking purposes, as provided in the Senate version. Instead, it directed the FCC to report on the need for legislation to define or further harmonize Federal and State authority over uniform accounting and depreciation accounting.

Congress' intent in enacting Section 220(j) was to make uniform, as far as reasonably possible, the accounting systems of interstate telephone companies. The House's version was rejected because it could result in multiple sets of books for multistate companies. The Senate's version was rejected because it interfered with State autonomy over intrastate rates, contrary to the scheme of independent State ratemaking authority embodied throughout the Act. Congress intended that carriers operate under a uniform system of accounts but also intended that the States be free to set depreciation rates for intrastate ratemaking purposes.

D. Read as a whole, The Communications Act demonstrates a Congressional intent to preserve State autonomy over all elements of intrastate ratemaking, including depreciation.

An Act is to be read as a whole and each provision must be construed in harmony with other provisions of the Act. *Weinberger v. Hynson, Westcott and Dunning,* 412 U.S. 609, 631-632 (1973). Reading Section 220 in harmony with other provisions of the Communications Act, it is not necessary to amend Section 220 to expressly preserve State depreciation authority for ratemaking purposes. Such an intent is already clearly evident elsewhere in the Act. The relationship of Federal and State authority under the Interstate Commerce Act was radically different from that under the Communications Act of 1934. Given this radical difference, the transfer of Federal accounting and

depreciation authority from the ICC to the FCC necessarily changed the effect of that authority on State regulation.

The Communications Act reflects an intent to safeguard independent State ratemaking authority in all respects. State ratemaking autonomy is emphazied and strengthened throughout the Act. Section 152(b)1 enumerates the elements of intrastate communication reserved to the States.[10] It specifically controls the interpretation of Title II and reserves all of the elements of intrastate ratemaking to the States. On its face, Section 152(b)1 clearly shows an intent to preserve State autonomy over all of the elements of intrastatate ratemaking. This detailed reservation of specific State ratemaking authority is repeated in Sections 221(b) and 410(b) of the Act.[11] Since State autonomy over all elements of intrastate telephone rates is preserved under the Communications Act, the purpose of Section 220(b) is limited to setting interstate rates.

Further, Section 152(b)(1), the Respondents' admit, was proposed by NARUC to overcome the *Shreveport* power possessed by the ICC. When NARUC objected to the Senate's version of subsection (j), which explicitly preempted State authority over depreciation for all intrastate ratemaking, it described the Bill as *Shreveporting* the States. Quite clearly, the *Shreveport* power encompassed more than Federal authority to set final rates. It included Federal preemption of the individual elements of intrastate ratemaking and, specifically, depreciation. Thus, the purpose of Section 152(b)1 extends to depreciation as an element of intrastate ratemaking. The Respondents' reading of Section 220(b) contravenes that purpose.

Unlike the Interstate Commerce Act, the Communications Act provides for the division of telephone plant for ratemaking

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[10] 47 U.S.C. §152(b)1.

Contrary to the assertion of GTE, Section 152(b)1 is not a paraphrase of Section 1(2) of the Interstate Commerce Act. Quite clearly, Section 152(b)1 is more foreceful, more comprehensive and more explicit than Section 1(2).

[11] 47 U.S.C. §§221(b) and 410(b).

purposes. Consistent with *Smith v. Illinois Bell Telephone Company*, 282 U.S. 133 (1930), Section 221(c) provides for FCC division of plant between interstate and intrastate ratemaking jurisdictions.[12] Thus, the investment recorded on a utility's accounts, including the depreciation of that investment, is allocated to separate jurisdictions for ratemaking purposes.

Unlike the Interstate Commerce Act, the Communications Act explicitly preserves State autonomy to determine the value of all telephone plant allocated to intrastate jurisdiction. Section 213(h) provides that FCC valuations have no effect on State authority.[13] Thus, the States are free to apply their own standards of valuation of utility investment for ratemaking purposes.[14] It would be incongruous to provide for State autonomy in valuing investment while requiring rigid conformance to Federal prescriptions of the rate at which that investment depreciates.[15]

Respondents contend that the Congressional intent to preempt the States under Section 220 is evidenced by the passage in the Natural Gas Act and the Federal Power Act of language similar to the language offered by the States for inclusion in the Communications Act but rejected by the Congress.[16] This, however, does not support the contention that Congress intended to deprive the States of the independent authority to set depreciation rates for intrastate ratemaking.

Noticeably absent from both the Natural Gas Act and the Federal Power Act are both the separations of jurisdiction provision in Section 221(c) and the detailed division and separation of State and Federal ratemaking authority in Sections 152(b)(1), 221(b) and 410(b).[17] Thus, it was necessary to insert specific language preserving State authority over depreciation for ratemaking purposes in those Acts. What was found to be offensive in NARUC's proposal was the possibility of inconsistent *accounting* requirements. The presence in the Communications Act of provisions recognizing the State's right to establish the methods and elements of intrastate ratemaking made it unnecessary for the Congress to grant redundant authority in subsection (j).

E. The FCC's implementation of Section 220 denies any Congressional intent to preempt.

The FCC's implementation of Section 220 shows that preemption by Statute is far from "unmistakably ordained" by Congress. The FCC "discovered" Congress' intent 49 years after enactment of Section 220 and after almost four decades of active enforcement of its provisions.

The FCC was granted authority to prescribe depreciation rates in 1934 and began to actively do so in the 1940's. It was not until 1983 that the FCC "discovered" the true meaning of Sec-

[12] 47 U.S.C. §221(c).

The FCC has adopted a separations procedures which it has codified in 47 C.F.R. Part 67. The FCC's regulations allocate investment in purely interstate plant directly to its jurisdiction, allocate investment in purely intrastate plant directly to the States and allocate investment in common-use plant to each jurisdiction according to relative usage.

[13] 47 U.S.C. §213(h).

[14] Section 213(h) repudiates AT&T's assertion that Congress determined that a piece of property located in one place depreciates at one rate. Under Section 213(h), property need not even have a single *value*, let alone a single rate of depreciation.

[15] Any notion of unified FCC regulation of depreciation is dispelled by Section 152(b)2, which exempts "connecting carriers" from Section 220. The States, not the FCC, prescribe the depreciation rates for these carriers.

[16] When Congress passed the Natural Gas Act and the Federal Power Act, they included provisions reserving State authority to set depreciation rates for *ratemaking* purposes. These provisions are *not* similar to NARUC's version of 220(j). See 16 U.S.C. §825a(a) and 15 U.S.C. §717h(a). Notably, these two Acts contain State participation provisions virtually identical to Section 220(i).

[17] 47 U.S.C. §152(b), 221(b), 221(c) and 410(b).

tion 220(b) and determined that Congress intended to preempt the States as a matter of law.[18] This occurred after almost four decades of contrary practice by the FCC and after a contrary ruling just the year before.[19] Congress could not have "unmistakably ordained" preemption if it took the FCC 49 years to realize this fact.

Though it had actively prescribed depreciation rates for almost 40 years, the FCC never before took the position that its prescriptions were preemptive, absent exemptions under 220(h). No FCC order, notice or regulation issued during that 40-year period even *hints* that FCC depreciation prescriptions were preemptive. The States claimed the right to deviate from FCC prescriptions and deviated from those prescriptions on occasion. The FCC's continual silence is clear and unmistakable evidence that the FCC had, for 49 years, viewed Section 220(b) as not binding the States at all.

The FCC's rejoinder is a deft assertion that it had no cause to exercise its dormant "power to preempt" because the States generally followed FCC prescriptions. This assertion is specious, for it contradicts the very interpretation that the FCC has given Section 220: Subsection (b) preempts the States unless the FCC *acts affirmatively* to exempt carriers.[20] The dormant power, under the FCC's new interpretation of Section 220 is not to *preempt*, it is to *exempt*. The FCC's silent acquiescence to past State deviation and its failure to ever hint at a preemptive effect to its prescriptions refute its new interpretation of Sec-

[18] See *In the Matter of Amendment of Part 31*, 92 F.C.C. 2d 864 (1983) (*1983 Preemption Decision*).

[19] See *In the Matter of Amendment of Part 31*, 89 F.C.C. 2d 1094 (1982) (*1982 Preemption Decision*). Respondents incorrectly State that the *1982 Preemption Decision* found Section 220 not to preempt by a 3 to 2 vote. In fact, the two dissenting Commissioners made no mention of preemption as a matter of law, but limited their discussion to the existence of frustration.

[20] *See 1983 Preemption Decision*, 92 F.C.C. 2d at 870.

tion 220. The FCC's not too subtle shift in its interpretation of Section 220 is simply an effort to avoid the issue.

The FCC's scattered references to "waivers" in certain regulations and orders are disingenuous. First, they are not exemptions from the requirements of Section 220. Second, they mix accounting prescriptions with depreciation prescriptions, contrary to the FCC's view of Section 220. Third, the FCC's first codification of its Uniform System of Accounts in 47 C.F.R. Part 31 (1939) cited Section 220(a) as its authority. No citation to Section 220(h) was made. In fact, no regulation or order issued by the FCC prior to its *1982 Preemption Decision* even mentions Section 220(h).

AT&T's and FCC's assertion that the FCC may "change" its interpretation of Section 220 is nothing short of a claim of an administrative power to legislate. This claim is particularly offensive in view of the fact that Title II of the Communications Act clearly shows a Congressional intent to define the relationship of Federal and State authority by statute rather than leave the matter to administrative discretion. Further, their assertion directly contradicts subsection (j), which directs the FCC to seek legislation to change the meaning of Section 220. Ultimately, their assertion offends the principles stated by this court in *Alessi v. Raybestos-Manhattan, Inc., supra,* for it substitutes agency discretion for Congressional intent.

II. The FCC Lacks authority to preempt depreciation policy for intrastate ratemaking purposes.

Summary

The Communications Act demonstrates a clear intent that telephone communication be subject to dual regulation. Congress intended that State regulation of intrastate communications be complete and that it be unhindered by possible FCC intervention. The Act does not permit FCC preemption of separable intrastrate regulations simply to advance Federal policy. The FCC may preempt only when State regulation encroaches

on Federal authority, such as when a particular subject will not permit dual regulation.

A. On its face, the Communications Act shows a scheme of dual regulation of telephone communication.

Congress adopted the Communications Act with the intent that telephone communication should be subject to dual regulation as an act of Federal/State comity. Congress intended that the FCC exercise jurisdiction only over interstate telephone communication and that the States exercise jurisdiction over intrastate comunication without threat of Federal intervention. As a contrast, under title III — "Regulation of Interstate Broadcasting," the FCC was granted authority to regulate interstate broadcast communication and all matters that affected such communication.[21] Thus, Title III regulation was intended to be truly unified. On the other hand, Title II — "Regulation of Interstate Telephone Communication" is subject to numerous reservations of State authority.[22] Read as a whole, the provisions of the Act governing telephone regulation demonstrate a clear intent by Congress to preserve State authority over all aspects of intrastate telephone communication.

Section 152(a) provides FCC jurisdiction over interstate communication, while Section 152(b) modifies the more general provisions of Section 152(a). Section 152(b) was intended to preserve State authority over all aspects of intrastate communication.[23] It does not withdraw FCC authority to regulate

[21]Once a person becomes subject to FCC licensing under Section 301 (47 U.S.C. §301), he is fully subject to FCC authority.

[22]E.g.: Even though a carrier is subject to FCC authority because it carries interstate telephone communication, FCC authority is specifically limited to the direct regulation of interstate communication. Even then, FCC authority does not extend fully, for certain aspects of interstate communication are withheld from the FCC in favor of State regulation.

[23]The States' jurisdiction is preserved over "charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier."

interstate communication. It simply limits the means by which that authority is to be exercised and the manner in which the goals stated in Section 151 of the Act are to be achieved.[24]

Under Section 152(b)1, the States retain their authority to regulate each element of ratemaking, as well as regulations, service and facilities used "for or in connection with" intrastate telephone service. Such authority is essential to State regulation of intrastate communications. For instance, local exchange facilities originate and terminate interstate toll service and are common-use facilities. Section 152(b) preserves State authority over common-use plant so that the States may regulate the local incidents of communication service.

The States do not argue, as the Respondents claim, that the FCC is deprived of authority over common-use facilities by Section 152(b)1. Occasions do arise where compliance with both FCC and State regulation is impossible. In those few cases, Sections 152(a) and 152(b)1 cannot be reconciled by their own terms, for FCC and State authority cannot coexist. One must prevail over the other. Hence, FCC authority must prevail where dual regulation is impossible. However, where a subject is severable and compliance with inconsistent FCC and State regulations is possible, the intent of Section 152 is clear: FCC and State authority is to coexist under a framework of dual regulation. The jurisdictional separations provisions of Section 221(c) clearly demonstrate the divisibility of depreciation policy. Once investment is allocated to its respective Federal/State jurisdiction, the rate at which that investment is returned (depreciation rate) may be set by each jurisdiction without affecting the authority of the other.

B. The Legislative history of the Act demonstrates an intent to preserve state authoriy.

The reason that the Communications Act contains various provisions safeguarding State authority is that the States were

[24]47 U.S.C. §151.

actively involved in writing the Act. State representatives helped prepare the text of the Senate and House Bills. They presented the Bills at Congressional hearings and explained at length the need to preserve State authority.

The State representatives sought to ensure that State regulatory bodies were not ousted from their jurisdiction.[25] NARUC actually favored the bills, for they established effective Federal regulation of matters that were difficult for the States to reach.[26] Representatives of State commissions felt that the bills preserved the rights that the States should possess.[27] Congress accepted the States' contention that State authority should be preserved and enacted provisions proposed by the States. The legislative history of the Act confirms that the scheme of dual regulation that appears on the face of the Act is, indeed, the intent of Congress.

C. The regulatory scheme proposed by the Respondents defies the provisions of the Act and its legislative history.

Respondents present this Court with a regulatory scheme in which the FCC has exclusive jurisdiction over virtually all telephone facilities in the nation and plenary authority to preempt any State regulation of intrastate communication that affects interstate communication. The Respondents urge that, at most, the States *may* be free to set intrastate rates, provided that they do so in conformance with FCC prescribed policies. This, of course, if the scheme Congress adopted under Title III of the Communications Act. It is *not* the scheme of regulation under Title II of the Act.

Respondents urge that the FCC's authority over facilities used for interstate communication is exclusive and that the States

[25] Senate Hearings at 153; House Hearings at 140.

[26] Senate Hearings at 155, 156; House Hearings at 69, 132, 136.

[27] Senate Hearings at 1154; House Hearings at 74.

have no authority over common-use facilities. Respondents claim that Section 152(b)1 only reserves State authority over purely intrastate facilities. Section 152(b)1 lends itself to no such reading, for it preserves State authority over "facilities . . . for *or in connection with* intrastate communication by wire or radio."

The Respondents reading of Section 152(b)1 also contradicts the terms of Section 221(b), which preserve State authority over "services [or] facilities for or in connection with wire telephone exchange service" when a portion of such service includes interstate communication. Since local exchange facilities are used for both interstate and intrastate communication, the Respondent's theory renders Section 221(b) meaningless. Congress would not have preserved State authority over common-use facilities that cross State lines if the States lacked authority over those facilities pursuant to Section 152(b)1. A harmonious reading of the two Sections occurs when Section 152(b)1 is read to preserve State authority over *all* facilities used for intrastate communication service and Section 221(b) is read to extend that protection to circumstances where local exchanges cross State lines.

The Respondents' claim of exclusive FCC authority over all common-use facilities is disproven by other provisions of the Act. In some cases it is the State and not the FCC that regulates common-use facilities. For instance, Section 214, which provides for FCC approval of new or extended telephone lines, prevents FCC supervision of local, branch or terminal lines up to 10 miles in length.[28] Moreover, since "connecting carriers" are completely exempted from Section 214 by Section 152(b)2, all extensions of their facilities are regulated by the States.

Further, the Respondent's theory leads to an absurd result. If the States lacked authority over local exchange plant, it would be virtually impossible to regulate local telephone service. Aside

[28] 47 U.S.C. §214.

from the fact this proposition defies Section 221(b), it could create a void in the regulation of telephone communication. The States could not regulate the terms and conditions of local exchange service or the quality of local exchange service. The FCC has no capacity to supervise local exchagne service provided to millions of customers across the nation. It is difficult to believe that Congress intended that the FCC be the sole means of redress to a local exchange customer when a company provided poor service, or no service at all.

Contrary to the Respondent's claims, the purpose of Section 152(b)1 goes beyond the protection of State power to set the ultimate rates for intrastate service. By its terms, Section 152(b)1 is more forceful and comprehensive than Section 65 of S.6, cited by GTE as its predecessor.[29] Section 152(b)1 states that nothing in the Act shall be construed to *apply* or to give the Commission *jurisdiction with respect to* intrastate charges, classifications, practices, services, *facilities*, or *regulations*. In contrast, Section 65 of S. 6 simply prohibited direct FC regulation of intrastate rates, charges or service to remove discrimination against interstate commerce or for other purposes. Section 152(b)1 shows an intent to protect all elements of intrastate communication regulation from both direct and indirect FCC authority.[30]

The FCC's misplaced claim of preemptive authority rests upon a line of cases following from *North Carolina Utilities Commission v. F.C.C.*, 437 F.2d 787 (4th Cir. 1976), *cert. denied*, 429 U.S. 1027 (1976) [NCUCI]. The *NCUC* cases recognize that when dual regulation is impossible, FCC jurisdiction must prevail. Hence, the following language appears in each case: ". . . [W]e are not persuaded that Section 2(b) sanctions any State regulation, formally restrictive only of intrastate communication, that in effect encroaches substantially upon the Commission's *authority* under Sections 201 through 205" (emphasis supplied).[31]

[29]See Brief of GTE Service Corp., etc., at 28.

[30]Contrary to the Respondents' assertions, the *Shreveport* power involved more than setting final rates. NARUC specifically referred to *Shreveport* in the controversy over Sectin 220(j). House Hearings at 73, Statement of K.L. Clardy.

The FCC's attempt to refute the fact that the *NCUC* cases rested on impossibility of dual regulation is misleading.[32] Even the lower Court recognized that the *NCUC* cases rested on impossibility. The FCC's argument demonstrates that its theory of preemptive authority relies upon ubiquitous logic.

Congress intended to describe the dividing line of FCC and State authority in the text of the Communications Act. If the test of FCC preemptive authority rests upon frustration of Federal policy, the intent of Congress to define the dividing line of FCC and State jurisdiction is defied. Permitting the FCC to preempt intrastate regulations that simply affect interstate communications result in endless hyperbole. The dividing line becomes lost in an endless analysis of "substantial" versus "insubstantial" effect.

Because most carriers provide both interstate and intrastate communication service, every regulation of intrastate communication affects interstate communication. The Respondents theory of preemption will inevitably lead to Federal preemption of all key elements of intrastate regulation. If the power to set final rates is the definition of "ratemaking," the FCC can preempt depreciation, rate of return and expense levels. It can dictate the entire revenue requirement and all principles of rate structure, leaving to the States the mere function of applying the FCC's formula.

A rational division of *jurisdiction* rests upon the attributes of *jurisdiction*. Congress *knew* State regulation would affect in-

[31]The FCC misquotes this sentence by inserting the word "exclusive" before the word "jurisdiction." See Brief for the Federal Respondents at 36.

[32]See Brief for the Federal Respondents at 37.

terstate communication. It nevertheless adopted a scheme of dual regulation. A test of FCC preemptive authority based on the impossibility of dual regulation is faithful to the scheme intended by Congress. Where dual regulation is impossible, State regulation necessarily encroaches on FCC authority. Where the subject is severable, however, there is no encroachment. Each regulatory body can exercise its own authority, as intended by Congress. Depreciation policy for ratemaking purposes is clearly severable between FCC and State authority. Each jurisdiction may set rates and charges for communication service based its own depreciation policy without interfering with the jurisdiction of the other.

CONCLUSION

Section 220 does not preempt depreciation for intrastate ratemaking as a matter of law. Telephone Communication is regulated by the FCC and the States under a system of dual regulation. The FCC lacks authority to preempt depreciation policy for intrastate ratemaking purposes, for that area of intrastate regulation is separable from and does not encroach on FCC authority. The order of the lower court should be set aside and the FCC's Preemption Order should be declared invalid.

Respectfully submitted,

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